

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
ITV of Buffalo, LLC)	
Licensee of Station WBBZ-TV,)	
Springville, New York)	CSR-8644-M
)	Docket No. 12-147
v.)	
)	
Time Warner Cable Inc.)	

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 2012

Released: August 10, 2012

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. ITV of Buffalo, LLC (“ITV”), licensee of local commercial television station WBBZ-TV, Springville, New York (“WBBZ”) has filed a must carry complaint pursuant to Sections 76.7, 76.56, and 76.61 of the Commission's rules¹ against cable operator, Time Warner Cable Inc. (“TWC”), seeking carriage on the latter’s system serving the Buffalo Designated Market Area (DMA).² TWC opposed the complaint,³ and ITV has filed a Reply.⁴ For the reasons discussed below, we grant ITV’s Complaint.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act of 1934, as amended (the “Act”), and implementing rules adopted by the Commission, local commercial television broadcast stations, such as WBBZ, are entitled to assert mandatory carriage rights on cable systems located within their market.⁵ A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen.⁶ The

¹ 47 C.F.R. §§ 76.7, 76.56, and 76.61.

² Must-Carry Complaint by ITV of Buffalo, LLC, filed May 23, 2012 (“Complaint”).

³ Opposition to Must Carry Complaint by Time Warner Cable Inc., filed July 5, 2012 (“Opposition”).

⁴ Reply to Opposition to Must-Carry Complaint by ITV of Buffalo, LLC, filed July 10, 2012 (“Reply”).

⁵ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, FCC 93-144, 8 FCC Rcd 2965, 2975-77, ¶¶ 41-46 (1993) (“*Must Carry Order*”). The Commission has subsequently extended mandatory carriage rights to digital television stations under Section 614(a) of the Act and has amended its rules accordingly. See *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules and Implementation of the Satellite Home Viewer Improvement Act of 1999*, CS Docket No. 98-120, First Report and Order and Further Notice of Proposed Rulemaking, FCC 01-22, 16 FCC Rcd 2598, 2606 ¶¶ 15-16, 2610 ¶ 28 (2001); see also 47 C.F.R. §76.64(f)(4).

⁶ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where available,

term DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Pursuant to the Commission's must carry rules, a cable operators is not obligated to carry a commercial television station that fails to provide a good quality signal to the cable operator's principal headend unless the station agrees to be responsible for the costs of delivering a good quality signal to the headend.⁷

3. ITV owns and operates WBBZ, an independent television station, in the Buffalo, New York, DMA.⁸ ITV claims that, of the ten counties encompassed by the Buffalo DMA, WBBZ-TV is only carried by TWC in Erie and Niagara counties, even though it is entitled to be carried throughout the DMA.⁹ ITV asserts that after informally negotiating with TWC over whether WBBZ provided a good quality signal to TWC's headends,¹⁰ ITV demanded carriage on TWC's cable systems served by its Batavia and Dunkirk headends and sought carriage on TWC's systems served by its Olean, Rochester, Jamestown, and Hornell headends, where it also offered to provide the necessary equipment to deliver a good quality signal pursuant to Section 76.55(c)(3) of the Commission's rules.¹¹ On May 23, 2012, ITV filed the instant Complaint asking the Media Bureau to compel carriage of WBBZ on TWC's Buffalo DMA cable systems.¹²

4. TWC filed an Opposition to ITV's complaint in which it requests that the Bureau dismiss the Complaint for procedural defects.¹³ That aside, TWC requested that if the Bureau should grant the Complaint and order it to carry WBBZ, the Bureau should confirm WBBZ's obligation to provide the necessary equipment to deliver a good quality signal as a prerequisite to carriage by TWC.¹⁴ Furthermore, TWC has requested the Bureau to hold that TWC may fulfill its obligation to carry WBBZ by carrying it only in a digital format.¹⁵

commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission's rules specifies that a commercial broadcast television station's market is its Designated Market Area as determined by The Nielsen Company. 47 C.F.R. § 76.55(e)(2).

⁷ *Must Carry Order*, 8 FCC Rcd at 2990-91; *see also* 47 C.F.R. § 76.55(c)(3).

⁸ Complaint at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See* Complaint, at 3 & Exhibit 2 (Letter from Alan G. Moskowitz, Counsel to WBBZ to General Managers, Time Warner Cable Buffalo and Rochester (March 26, 2012); Letter from Alan G. Moskowitz, Counsel to WBBZ to John R. Wilner, Esq., Counsel to Time Warner Cable (March 26, 2012)); *see also* 47 C.F.R. § 76.55(c)(3). The TWC headends of Olean, Rochester, Jamestown, and Hornell serve McKean and Potter Counties in Pennsylvania and Cattaraugus, Chautauqua, and Allegany Counties in New York, whereas the Batavia and Dunkirk headends serve communities in Allegheny, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Wyoming, and Chautauqua. *See* Complaint, Exhibit 2, Letters.

¹² *See supra* n. 2.

¹³ TWC argued that WBBZ's failure to serve the necessary franchising authorities required dismissal of the complaint. Opposition at 1-2; *see also* 47 C.F.R. § 76.7. However, as we have found, failure to serve a complaint upon the franchising authorities is a curable defect. *See Better Life Television, Inc. v. Charter Commc'ns*, 18 FCC 9414, 9416 n.17 (2003). Dismissal is only proper if the complainant party fails to cure the defect in a timely manner after having received notice. *See KM Television of El Dorado, LLC v. Cox Commc'ns, Inc.*, 19 FCC Rcd 9889, 9892 (2006). Since ITV has cured its deficiency, we decline to dismiss its Complaint. *See* Reply at 2.

¹⁴ Opposition at 2.

¹⁵ *See id.* at 2-3.

5. In a Reply, ITV states it is willing to provide, at its own cost, the necessary equipment to deliver a good quality signal to TWC's headends as a prerequisite to carriage by TWC.¹⁶ However, ITV opposes TWC's request to only carry WBBZ in digital and requests that the Commission order TWC to carry WBBZ in both analog and digital should the Commission grant ITV's Complaint.¹⁷

III. DISCUSSION

6. TWC does not contest ITV's claim that WBBZ is entitled to carriage on TWC's cable systems in the Buffalo DMA, but it seeks assurance that WBBZ will provide it with a good quality signal. The Commission has interpreted Section 76.55(c)(3) to mean that a television station failing to deliver a good quality signal can, at its own expense, provide the necessary equipment to otherwise ensure a good quality signal.¹⁸ Therefore, we grant ITV's request and order that TWC must carry WBBZ in the in the Buffalo DMA communities it has specified¹⁹ provided that WBBZ provides a good quality signal to TWC's headends, or, if necessary, provides the equipment to do so at ITV's expense.²⁰

7. TWC cites to the Commission's *Fifth Report and Order*²¹ in arguing that carrying WBBZ in both analog and digital would be inefficient and would cause consumer confusion, particularly given that the Commission's viewability rule requiring analog carriage sunset on June 12, 2012, and TWC does not intend to carry WBBZ in analog after December 12, 2012.²² We note that although the viewability rules requiring dual carriage sunset on June 12, for the six month period between June 12 and December 12, 2012, the Commission adopted an interim requirement that operators of hybrid cable systems must continue to carry the signals of must-carry stations in analog format to all analog cable subscribers.²³ Therefore, we deny TWC's request for digital only carriage of WBBZ and require that it carry the station in analog until TWC satisfies the conditions allowing digital only carriage set forth in the *Fifth Report and Order*.²⁴

IV. CONCLUSION

8. We find that ITV's station, WBBZ, is entitled to carriage and that TWC must carry the station on all of its systems serving the Buffalo DMA, so long as ITV cures any signal deficiencies at its own cost, and that TWC must carry WBBZ in both digital and analog formats until TWC satisfies the conditions allowing digital only carriage set forth in the *Fifth Report and Order*.

¹⁶ Reply at 3.

¹⁷ *Id.*

¹⁸ See *Hispanic Keys Broad. Corp. v. Adelphia Cable Partners*, 15 FCC Rcd 15061, 15062-63 (2000); *Must Carry Order*, 8 FCC Rcd at 2991.

¹⁹ These are the cable systems served by TWC's Olean, Rochester, Jamestown, Hornell, Batavia, and Dunkirk headends. See *supra* n. 11.

²⁰ See Section 47 C.F.R. § 76.55(c)(3). ITV is apparently willing to bear the costs of delivering a good signal to TWC's headends. See Complaint at 3.

²¹ *Carriage of Digital Television Broadcast Signals: Amendment to the Commission's Rules*, CS Docket No. 98-120, Fifth Report and Order, FCC 12-59, 27 FCC Rcd. 6529 (June 12, 2012) ("*Fifth Report and Order*").

²² Opposition at 2-4 & n.10.

²³ *Fifth Report and Order*, 27 FCC Rcd. 6529 at ¶ 17.

²⁴ *Id.* at ¶¶ 17-18.

V. ORDERING CLAUSE

9. Accordingly, **IT IS ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, that the complaint filed by ITV of Buffalo, LLC, licensee of WBBZ-TV, Springville, New York **IS GRANTED**, and Time Warner Cable Inc. shall commence carriage of WBBZ-TV on its cable systems serving the Buffalo DMA within sixty (60) days after ITV of Buffalo delivers a good quality signal to Time Warner cable systems' principal headends.

10. This action is taken under authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

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